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DEPARTMENT OF
WATER RESOURCES

Attorneys for Appellant

IN RE: SNAKE RIVER BASIN
ADJUDICATION CASE NO. 39576

Respondent.

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I. INTRODUCTION

The United States has filed a motion for an extension of time to file its responsive brief in this case for the stated reason that the attorneys for the United States still do not have authority to prosecute or defend the within appeals. *See* Affidavit of Elizabeth P. Ewens, filed herewith. This is not a legitimate basis for an extension of time. For nine months, this case has been pending before the Idaho Supreme Court, and apparently at no time during the pendency of this appeal has the United States given its attorneys authority to engage in these appeals or to file substantive briefs in this case. During the same period of time, LU Ranching has expended considerable time, energy, and resources to review the record in these cases, to prepare and file its Opening Brief on appeal, and to work toward expeditious resolution of this case. Under such circumstances, the United States' dilatory practices are both unconscionable and severely prejudicial to LU Ranching. For this reason, Appellant, LU Ranching Co. ("LU Ranching") hereby submits this Response in Opposition to the United States' Motion for Extension of Time and requests that the Court deny the United States' request for extension of time in its entirety.

II. ARGUMENT

LU Ranching filed its Opening Brief on appeal on February 13, 2006. Pursuant to the applicable rules and Order of this Court, the deadline for the United States to file its responsive brief in this case is March 13, 2006. *See* Order dated February 15, 2006. On March 8, 2006, United States' counsel advised undersigned counsel, Elizabeth Ewens, of the United States' intent to file a motion for extension of time. The only stated reason for the United States' requested extension of time was that the attorneys for the United States have not obtained authority from their client to file briefs in this case. *See* Affidavit of Elizabeth P. Ewens.

Specifically, the attorneys for the United States have been unable to obtain permission to file either a responsive brief to LU Ranching's appeal or an opening brief in support of the United States' own cross-appeal. Nine months have passed since the appeal was filed in this case and the United States still does not have permission to prosecute these appeals. Under such circumstances any requests for extensions of time should be denied. Any other result would not only prejudice LU Ranching, but would be adverse to the fair and efficient administration of justice.

Court rules, including the rules of professional conduct, and case precedent are all consistent in that an attorney may not act on her own initiative, but rather must have authorization from the client to take substantive action in a case. *See* I.R.P.C. 1.2, including commentary thereto (the lawyer shall consult with the client and may take such action as is impliedly authorized); *see also e.g. Muncey v. Children's Home Finding & Aid Society of Lewiston*, 84 Idaho 147, 152 (1962) (attorney has implied authority with respect to procedural or remedial matters, but implied authority does not extend to doing acts which result in surrendering any substantial right; the right to appeal is a substantial right). In the present case, the United States apparently has not given its attorneys authorization to either defend LU Ranching's appeal, and, even more glaring, has not given its attorneys authority to file a brief in support of the United States' own appeal. This conduct should not be tolerated, or facilitated by way of extending to the United States the privilege of an extension of time.

Parties are not entitled to extensions of time as a matter of right. To the contrary, requests for extensions of time are not favored, and should only be granted by the Supreme Court upon a clear showing of good cause. *See* I.A.R. 34(e); *see also* I.A.R. 46. To ensure the fair and

expeditious administration of justice by courts, strict time limits are prescribed by the rules, and failure to comply with these deadlines can result in the dismissal of an appeal. Specifically, the Idaho Appellate Rules provide that failure of a party to timely take any step in the appellate process may be grounds for sanction including, but not limited to, dismissal of the appeal. *See* I.A.R. 21 (effect of failure to comply with time limits).

The above rules are consistent with the Idaho Rules of Professional Conduct, and the official comments thereto, which require counsel to use all reasonable efforts to expedite litigation. Rule 3.2 provides as follows:

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

(Commentary) Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose.

I.R.P.C. 3.2 (*including commentary*). The SRBA subcases at issue herein have been in active litigation between LU Ranching and the United States since 1999, and have been on appeal before this Court since June 2005. Absent extraordinary circumstances that, currently, do not exist, further delays in resolving this case should not be tolerated.

The Orders which are the subject of the within appeals include the January 4, 2005 Memorandum Decision and Order on Challenge and Orders on Partial Decrees, and the May 2, 2005 Order on LU Ranching's Motion for Reconsideration. Accordingly, the clock has been running on these appeals since May 2, 2005 when the final Order was issued by the District Court. From May 2, 2005 forward, each party was charged with the task of determining whether and to what extent an appeal was warranted, and then to proceed accordingly. On June 9, 2005,

LU Ranching filed a Notice of Appeal in this case and gave its counsel full authority to proceed as necessary and appropriate. The United States followed with a Notice of Cross-Appeal, filed with the Court on June 30, 2005. However, almost nine months later, it appears that the attorneys for the United States still lack any authority from their client to file briefs in these appeals.

The reality is that the United States already has enjoyed a longer than usual period of time to prepare its briefs and participate in this appeal. *See* I.A.R. 34(c) (prescribing time limits for filing appellate briefs). After the initial appeal and cross-appeals were filed in this case, LU Ranching filed a related Notice of Appeal from the District Court's Order re: Attorneys Fees, in September 2005. Subsequent to this, the United States filed a Motion for Partial Stay of the attorneys fees appeal, and LU Ranching filed a Motion to Consolidate *LU Ranching v. United States* with *Joyce Livestock v. United States* (Supreme Court Nos. 32278 and 32279). The effect of these intervening motions was to stay the briefing schedules in the LU Ranching appeal, thus affording each of the parties additional time to prepare their respective briefs in this case.

The United States also knew, one month prior to filing this motion for extension of time at issue herein, of LU Ranching's position that this case must proceed without further delay. *See* Affidavit of Elizabeth P. Ewens. In the context of discussing briefing schedules, on approximately February 1, 2006, counsel for the United States disclosed to undersigned counsel that she did not have authority to file a brief in these appeals, and that a further extension of time might be requested if she could not obtain such authority from the United States' solicitors office by March. During that conversation, undersigned counsel advised the attorney for the United

States that LU Ranching would not stipulate to such an extension.¹

The United States' brief is due on Monday, March 13, 2006, and it should be held to this deadline. While certainly there are situations in which scheduling conflicts or other exigent circumstances justify an extension of time, this is not such a case. Failure, almost nine months after an appeal is filed, to obtain permission from your client to defend an appeal or to file a brief in support of the client's own appeal does not fall within the definition of "good cause" and does not justify an extension of time. To the contrary, when the only stated reason for the requested extension is that the United States has not authorized this appeal nearly nine months after it filed a Notice of Cross-Appeal, a request for an extension of time is absolutely unreasonable and unconscionable. LU Ranching has been required to expend time, effort, money, and other resources to timely file its Opening Brief and participate in this appeal while at the same time not knowing if or when the United States will ever respond to LU Ranching's appeal or whether the United States will ever file a brief in support of its own cross-appeal. Under such circumstances, the United States' requested extension of time should be denied, and if it is unable to comply with the deadlines set by this Court, then default should be entered against the United States with respect to LU Ranching's appeal, and the United States' cross-appeal should be dismissed. *See* I.A.R. 21 (setting forth penalties for failure to comply with time limits).

¹ Under other circumstances, LU Ranching has not opposed the United States' requests for an extension of time. On November 16, 2005, the United States requested an extension of time to file a response to LU Ranching's Motion to Consolidate Appeals. LU Ranching did not oppose that request.

III. CONCLUSION

If an appeal was filed on behalf of a private-party litigant without first obtaining permission from that client to pursue an appeal, that conduct would not be tolerated. The result should not be different when the litigant at issue is the United States. For over eight months, LU Ranching has diligently engaged in this appeal with the sole purpose of obtaining final judicial resolution of the issues in this case. During the same eight month period, the United States has failed to give its attorneys authorization to defend or prosecute these appeals. The United States' conduct in this regard is unconscionable, prejudicing not only LU Ranching but also bringing the administration of justice into disrepute. Accordingly, LU Ranching respectfully requests that this Court deny the United States' Motion for Extension of Time in its entirety. Further, if the United States fails to timely file its brief in this case, LU Ranching moves this Court to enter judgment in favor of LU Ranching and to award LU Ranching all relief prayed for in its appeals in this case, and additionally moves this Court to dismiss the United States' cross-appeal in its entirety. *See* I.A.R. 21.

Dated this 11 day of March 2006.

Respectfully submitted,

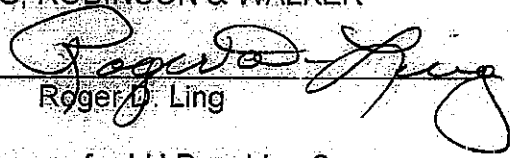
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CERTIFICATE OF SERVICE

I certify that on March 11, 2006, I served a true and correct copy of foregoing **APPELLANT'S RESPONSE IN OPPOSITION TO UNITED STATES' MOTION FOR EXTENSION OF TIME** upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

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